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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CITY OF MERCED, Petitioner, v. MERCED COUNTY SUPERIOR COURT, Respondent.	F059301 (Super. Ct. No. 148451) **OPINION**
EXXON MOBIL CORPORATION, Real Party in Interest.	

ORIGINAL PROCEEDING: Petition for Writ of Mandate or other appropriate relief; Superior Court of Merced County. Carol K. Ash, Judge.

Miller, Axline & Sawyer, and Michael Dana Axline; Gregory G. Diaz, City Attorney and Jeanne E. Schechter, Chief Deputy City Attorney, for Petitioner.

No appearance for Respondent.

Sheppard, Mullin, Richter & Hampton, Jeffrey J. Parker, Whitney Jones Roy and Alison N. Kleaver, for Real Party in Interest.

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INTRODUCTION

Petitioner City of Merced (Merced) seeks a writ of mandate to prevent enforcement of the trial court's order compelling disclosure of the contingency fee agreement between Merced and its outside counsel, Miller, Axline & Sawyer (Counsel). The fee agreement provides for Counsel's representation in a civil suit against real party in interest Exxon Mobil Corporation (Exxon) and other defendants arising from alleged MTBE and TBA contamination of Merced's public water supply.[1]

Contingency fee agreements on their face are protected by attorney-client privilege under Business and Professions Code section 6149.[2] The Legislature abolished the common law attorney-client privilege when it established a strictly statutory privilege with statutory exceptions. (Evid. Code, §§ 911; 950 et seq.) Exxon contends the Supreme Court implied a nonstatutory exception to the privilege in its decisions in *People ex rel Clancy v. Superior Court* (1985) 39 Cal.3d 740 (*Clancy*) and *County of Santa Clara v. Superior Court* (2010) 50 Cal.4th 35 (*Santa Clara*) based on a public policy of ensuring government attorney neutrality in public nuisance actions. Even assuming, for the sake of argument, a nonstatutory exception exists, in our view the

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[1] MTBE is a gasoline additive; TBA is a gasoline constituent and also related to MTBE.

[2] Business and Professions Code section 6149 states: "A written fee contract shall be deemed to be a confidential communication within the meaning of subdivision (e) of Section 6068 and of Section 952 of the Evidence Code."

Business and Professions Code section 6068, subdivision (e) states: "It is the duty of an attorney to do all of the following: [¶] … [¶] (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Subdivision (e)(2) of section 6068 concerns revealing confidential information to prevent death or substantial bodily harm and is not relevant to the case before us.

Section 952 of the Evidence Code is titled "Confidential communication between client and lawyer" and defines such phrase.

proponent of such exception would still be required to make a threshold showing of facts supporting the exception's application. (*See Nowell v. Superior Court* (1963) 223 Cal.App.2d 652, 657 ["'evidence should be presented, to make a prima facie showing that this was the client's purpose, before the communication is received.' (Witkin, Cal. Evidence, § 420, p. 470.)"].) Exxon failed to do so here, and we therefore grant the petition.

FACTUAL AND PROCEDURAL HISTORY

Merced filed a complaint against Exxon and several other gasoline industry defendants in April 2005,[3] claiming failure to warn, negligence, trespass, and public nuisance arising from MTBE and TBA contamination of Merced's public water supply.[4] Merced requested compensatory and exemplary damages as relief, as well as abatement of the nuisance.

During the course of discovery in early 2009, Exxon submitted interrogatories requesting disclosure of Merced's arrangements with any private law firms or attorneys in connection with the lawsuit, with the intention of determining whether or not there was evidence supporting a motion for disqualification of Counsel for improper representation on a contingency fee basis, pursuant to *Clancy*, *supra*, 39 Cal.3d 740. Merced acknowledged it had a contingency fee agreement with Counsel, but refused on attorney-client privilege grounds to disclose further information regarding payment of related litigation costs and expenses. Exxon moved to compel further response as to the specific payment arrangements. The trial court denied Exxon's motion on grounds that Merced's admission of the existence of a contingency fee agreement with Counsel sufficiently

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[3] Exxon is the sole real party in interest to the petition before us.

[4] According to Merced's complaint, MTBE use in motor fuel was phased out by Governor Davis and state agencies were required to "achieve 100% removal no later than December 31, 2003."

addressed Exxon's underlying reason for the interrogatory regarding payment arrangements, i.e., a concern that Counsel was providing representation on a contingency fee basis.

Exxon then submitted a request to Merced for production of all documents reflecting or referring to "agreements, arrangements, or contracts for legal services (including but not limited to contingency fee agreements and fee sharing agreements) that YOU have entered into with any private law firm, including but not limited to Miller, Axline & Sawyer, in connection with the [lawsuit]." Merced again refused on attorney-client privilege grounds.

After an unfruitful attempt to meet and confer, Exxon filed a motion to compel production, relying on *Clancy*'s open discussion of fee agreement terms and its holding prohibiting contingency fee agreements in public nuisance actions as basis to overcome Merced's claim of attorney-client privilege. Merced maintained its contention that Business and Professions Code section 6149's grant of attorney-client privilege to fee agreements was absolute and no exception applied, and also argued that *Clancy* did not expressly address section 6149 or the attorney-client privilege generally, nor otherwise discuss fee agreement disclosures.[5] Acknowledging the fee agreement was privileged, the trial court reasoned, however, that the privilege was not absolute, since the court could not "if a *Clancy* motion is brought, clearly judge the neutrality or the appropriateness between a private relationship between the counsel and the City without knowing the terms of the fee agreement." The trial court thus ordered Merced to disclose the fee agreement.

Merced filed a motion for reconsideration, contending that Exxon failed to show good cause for overruling attorney-client privilege, that the privilege was absolute in

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5 All further statutory references are to the Business and Professions Code unless otherwise stated.

protecting the fee agreement, and, in the alternative, any court order compelling production should be narrowly tailored to disclosure solely "addressing decision-making with respect to the litigation." In connection with its motion for reconsideration, Merced also submitted, and was granted, an application to file under seal a supplemental declaration. Merced attached the contingency fee agreement and an amendment to the fee agreement to the declaration, but specifically denied waiving attorney-client privilege in responding to the court's order.

Without mentioning whether it had reviewed the fee agreement in camera, the trial court denied Merced's motion for reconsideration on grounds that good cause had been shown, and with respect to Merced's request for partial production, that Merced should have raised such issues in connection with the prior motion to compel. The trial court again ordered production of the written fee agreement between Merced and Counsel.

Merced then filed the petition for writ of mandate before us, asking that this court compel the trial court to vacate its orders compelling production or, in the alternative, to limit production to the provisions regarding control of the litigation. After requesting and receiving further briefing from the parties, this court issued an order to show cause why a writ of mandate should not issue granting the relief requested.

The Supreme Court handed down its decision in *Santa Clara*, *supra*, 50 Cal.4th 35 after this court received the initial return and reply to the order to show cause. The parties submitted supplemental briefing on *Santa Clara*.

I.

Relief Appropriate by Mandate; Standard of Review

"Extraordinary review of a discovery order will be granted when a ruling threatens immediate harm, such as loss of a privilege against disclosure, for which there is no other adequate remedy." (*Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1493; *see also Roberts v. Superior Court* (1973) 9 Cal.3d 330, 336 ["The need for the availability of the prerogative writs in discovery cases where an order of the trial

court granting discovery allegedly violates a privilege of the party against whom discovery is granted, is obvious."].) As the trial court's discovery order would result in Merced's loss of attorney-client privilege protection for its fee agreement, review of the petition for writ of mandate is appropriate. Furthermore, "[a] trial court's determination of a motion to compel discovery is reviewed for abuse of discretion. [Citation.] An abuse of discretion is shown when the trial court applies the wrong legal standard. [Citation.]" (*Costco Wholesale Corporation v. Superior Court* (2009) 47 Cal.4th 725, 733 (*Costco*).) Thus, we review the trial court's discovery order for abuse of discretion.

II.

Discussion

Contingency Fee Agreements in Public Nuisance Abatement Actions

The underlying controversy prompting the petition for writ of mandate before us is the possibility that Exxon will make a motion to disqualify Counsel from representing Merced on a contingency fee basis pursuant to *Clancy* and *Santa Clara*. Since the parties spend significant effort discussing these two cases, we will provide a brief synopsis of them here. We note, however, that the issue before us is not a motion for disqualification, but instead the much narrower question of whether or not attorney-client privilege protects Merced's contingency fee agreement with Counsel.

Clancy involved the City of Corona's lengthy attempt to shut down an independent adult bookstore. Following a federal court's determination that the city's previous ordinances attempting to regulate the bookstore were unconstitutional, the city hired James Clancy on a contingency fee basis to represent it in a public nuisance abatement action against the bookstore. (*Clancy*, *supra*, 39 Cal.3d at p. 743.) Initially, the city listed James Clancy as its "'special attorney'" on the complaint filed against the bookstore owners. (*Id.* at p. 744.) The city amended its complaint, however, "substituting 'City Attorney of Corona' as Clancy's title in the action." (*Ibid.*) The court

openly discussed the terms of the contingent fee agreement,[6] but made no mention of how it came to discover the terms. (*Id.* at p. 745.)

The *Clancy* court found that "the contingent fee arrangement between the City and Clancy is antithetical to the standard of neutrality that an attorney representing the government must meet when prosecuting a public nuisance abatement action." (*Clancy*, supra, 39 Cal.3d at p. 750.) In reaching its conclusion, the Supreme Court focused on three primary considerations: a) the duty of neutrality imposed on government attorneys in criminal prosecutions and its extension to civil cases (*id.* at p. 745-748); b) the need to balance the interests of the public and the landowner, including constitutional interests of free speech (*id.* at p. 748-749); and, c) the potential for criminal prosecution and liability triggered by the civil suit. (*Id.* at p. 749.)

After examining the duty of neutrality required of criminal prosecutors, the court concluded "[t]he justification for the prohibition against contingent fees in criminal actions extends to certain civil cases," and noted "the rigorous ethical duties imposed on a criminal prosecutor also apply to government lawyers generally." (*Clancy, supra,* 39 Cal.3d at p. 748.) The court specifically disclaimed, however, an overbroad reading of its opinion, stating "[n]othing we say herein should be construed as preventing the government, under appropriate circumstances, from engaging private counsel. Certainly there are cases in which a government may hire an attorney on a contingent fee to try a civil case." (*Ibid.*)

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6 The court described the contract terms: "The contract of employment between the City and Clancy contains a fee provision according to which Clancy is to be paid $60 per hour, 'provided, however, that with respect to each and every suit undertaken by Attorney hereunder which results in a final judgment against CITY, said fee shall be reduced to $30.00 per hour … and provided further that said fee of $60.00 shall also be reduced to $30.00 per hour … in each and every suit undertaken by ATTORNEY hereunder in which CITY is a successful party if and to the extent that the CITY does not recover its attorney's fees from the unsuccessful party or parties.'" (*Clancy, supra,* 39 Cal.3d at p. 745.)

The court went on to analogize public nuisance abatement actions to eminent domain actions, noting the necessity of "a balancing of interests" between the public and the landowner. (*Clancy, supra,* 39 Cal.3d at p. 749.) In eminent domain actions, the court noted, the government attorney has a duty to perform "a sober inquiry into values, designed to strike a just balance between the economic interests of the public and those of the landowner." (internal quotations and citations omitted) (*Ibid.*) Likewise, in public nuisance actions, a balance lies between "the interest of the people in ridding their city of an obnoxious or dangerous condition" and "the interest of the landowner in using his property as he wishes." (*Ibid.*) The court also noted the particular public nuisance action at issue implicated First Amendment interests that warranted greater weight for an absolute neutrality requirement that would preclude a contingency fee agreement: "the landowner [has] a First Amendment interest in selling protected material, [and] the public has a First Amendment interest in having such material available for purchase." (*Ibid.*) The court thus concluded, "[a]ny financial arrangement that would tempt the government attorney to tip the scale cannot be tolerated." (*Ibid.*)

The court finally noted, "[a] suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. This connection between the civil and criminal aspects of public nuisance law further supports the need for a neutral prosecuting attorney." (*Clancy, supra,* 39 Cal.3d at p. 749, fn. omitted.) Based on these considerations, the Supreme Court appeared to categorically bar public entities from entering into contingency fee agreements with private counsel in public nuisance actions. (*Ibid.*; see *Santa Clara, supra,* 50 Cal.4th at p. 56.)

Twenty-five years later, facing "a qualitatively different set of interests," (*Santa Clara,* 50 Cal.4th at p. 54) the Supreme Court revisited its decision in *Clancy*. In *Santa Clara,* plaintiffs-petitioners were 10 public municipalities prosecuting a public nuisance

action against a number of lead-paint manufacturers.[7] The court again discussed specific terms of several of the fee agreements,[8] but in describing how the court came to review the agreements, noted only that "[d]efendants attached to their motion a number of fee agreements between the public entities and their private counsel, and the public entities filed opposition to which they attached their fee agreements and declarations of their government attorneys and private counsel." (*Id.* at p. 44.) In fact, only seven of the 10 public entities submitted their fee agreements for review.[9] (*Id.* at pp. 45-46, fns. 3&5.)

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[7] The public municipalities were: County of Santa Clara (Santa Clara), County of San Mateo (San Mateo), County of Monterey (Monterey), County of Solano (Solano), County of Los Angeles, County of Alameda (Alameda), City and County of San Francisco (San Francisco), City of Oakland (Oakland), City of Los Angeles, and City of San Diego (San Diego). (*Santa Clara*, *supra*, 50 Cal.4th at p. 44, fn. 1.)

[8] The court described the terms of the agreements and declarations: "other than $150,000 that would be forwarded by Santa Clara to cover initial costs, private counsel would incur all further costs and would not receive any legal fees unless the action were successful. If the action succeeded, private counsel would be entitled to recover any unreimbursed costs from the 'recovery' and a fee of 17 percent of the 'net recovery.'" (*Santa Clara*, *supra*, 50 Cal.4th at p. 45.) The court further described the economic terms, quoting various agreements' definitions of "recovery." (*Id.* at p. 46.)

The court also noted that "[s]ome of the contingent-fee agreements in the present case specify the respective authority of both private counsel and public counsel to control the conduct of the pending litigation." (*Santa Clara*, *supra*, 50 Cal.4th at p. 45.) The court went on to describe in more detail those provisions, quoting specific language from various agreements. (*Ibid.*)

[9] Santa Clara, Solano, Alameda, Oakland, Monterey, San Mateo, and San Diego hired Cotchett, Pitre & McCarthy (Cotchett) as outside counsel on a contingency fee basis. (*Santa Clara*, *supra*, 50 Cal.4th at p. 45, fn. 3.) Of those seven entities, six provided fee agreements to the court for review (San Mateo did not). (*Id.* at p. 46, fn. 5.) Cotchett also provided a declaration that its public entity clients' government counsel "'have maintained and continue to maintain complete control over all aspects of the litigation'" and "'all decision making authority and responsibility.'" (*Id.* at p. 45, fn. 3.)

San Francisco hired three different outside counsel entities and provided its fee agreement for review. (*Santa Clara*, *supra*, 50 Cal.4th at p. 46, fn. 5.) Those three outside counsel entities also provided declarations asserting circumstances of control over the litigation substantially similar to the Cotchett declaration. (*Id.* at p. 45, fn. 3.)

The Supreme Court discussed in detail its reasoning in *Clancy* and explained, "our decision in *Clancy* [citation], was guided, in large part, by the circumstance that the public-nuisance action pursued by [the city] implicated interests akin to those inherent in a criminal prosecution. In light of this similarity, we found it appropriate to invoke directly the disqualification rules applicable to criminal prosecutors-rules that categorically bar contingent-fee agreements in all instances." (*Santa Clara*, *supra*, 50 Cal.4th at p. 51.) The court distinguished the circumstances of *Clancy* from those of *Santa Clara*, summarizing, "[t]he public-nuisance action in the present case, by contrast, involves a qualitatively different set of interests-interests that are not substantially similar to the fundamental rights at stake in a criminal prosecution. We find this distinguishing circumstance to be dispositive." (*Id.* at p. 55.) The court described the different interests:

> "The challenged conduct (the production and distribution of lead paint) has been illegal since 1978. Accordingly, whatever the outcome of the litigation, no ongoing business activity will be enjoined. Nor will the case prevent defendants from exercising any First Amendment right or any other liberty interest. Although liability may be based in part on prior commercial speech, the *remedy* will not involve enjoining current or future speech. Finally, because the challenged conduct has long since ceased, the statute of limitations on any criminal prosecution has run and there is neither a threat nor a possibility of criminal liability being imposed upon defendants." (*Ibid*., italics original.)

Furthermore,

> "[t]his case will result, at most, in defendants' having to expend resources to abate the lead-paint nuisance they allegedly created, either by paying into a fund dedicated to that abatement purpose or by undertaking the abatement themselves. The expenditure of resources to abate a hazardous substance affecting the environment is the type of remedy one might find in an ordinary civil case and does not threaten the continued operation of an existing business." (*Id.* at pp. 55-56.)

The court concluded,

> "[b]ecause-in contrast to the situation in *Clancy*-neither a liberty interest nor the right of an existing business to continued operation is threatened by

> the present prosecution, this case is closer on the spectrum to an ordinary civil case than it is to a criminal prosecution. The role played in the current setting both by the government attorneys and by the private attorneys differs significantly from that played by the private attorney in *Clancy*. Accordingly, the absolute prohibition on contingent-fee arrangements imported in *Clancy* from the context of criminal proceedings is unwarranted in the circumstances of the present civil public-nuisance action." (*Id.* at p. 56, fn. omitted.)

The *Santa Clara* court thus narrowed its holding in *Clancy* to permit contingency fee agreements in certain public nuisance actions. The court, however, acknowledged that attorneys prosecuting public nuisance actions on behalf of the government are subject to "a heightened standard of neutrality." (*Santa Clara*, *supra*, 50 Cal.4th at p. 57.) Consequently, the court set forth "minimum requirements for a retention agreement between a public entity and private counsel adequate to ensure that critical governmental authority is not improperly delegated to an attorney possessing a personal pecuniary interest in the case." (*Id.* at p. 64.) Required provisions ensure "neutral, conflict-free government attorneys retain the power to control and supervise the litigation." (*Id.* at p. 58.) Thus, fee agreements must specify that neutral government attorneys, rather than private counsel, have ultimate authority to make "critical discretionary decisions," (*id.* at p. 61), including "decisions regarding settlement of the case." (*Id.* at p. 63.) Other provisions must provide that defendants can contact the lead government attorney directly (*ibid.*), that government attorneys "retain complete control over the course and conduct of the case," (*id.* at p. 64) and "retain a veto power over any decisions made by outside counsel," (*ibid.*) and that "a government attorney with supervisory authority must be personally involved in overseeing the litigation." (*Ibid.*)

While the courts in *Clancy* and *Santa Clara* were tasked with determining the propriety of the existence and parameters of contingency fee agreements in the context of public nuisance actions, as noted above, we are here presented with a much narrower and tangential question: whether or not a contingency fee agreement in a public nuisance action remains protected by the attorney-client privilege.

Discovery of Fee Agreements

Exxon contends that were it to file a motion for disqualification, both Exxon and the trial court would need to review specific terms of the fee agreement to ensure compliance with *Clancy*'s and *Santa Clara*'s public policy upholding a duty of neutrality for government attorneys and their private counsel in public nuisance actions. The parties admit that fee agreements generally fall within the protection of the attorney-client privilege and the attorney-client privilege is absolute. Merced contends protection is granted by section 6149 and no exceptions exist to breach the privilege and render a fee agreement discoverable. Exxon, however, argues that while fee agreements are "ordinarily subject to the attorney-client privilege," the "*Clancy* doctrine" providing for government attorney neutrality in public nuisance actions creates an exception that breaches the attorney-client privilege protection otherwise accorded Merced's fee agreement under section 6149. More specifically, Exxon contends that by necessity, and to ensure the integrity of public nuisance prosecutions, a "*Clancy* exception" to the privilege should exist allowing Exxon and the court to review the entire fee agreement to ensure it is not illegal under the framework set forth in *Clancy* and *Santa Clara*. This court, however, need not determine the validity of a *Clancy* exception here.

Even assuming a *Clancy* exception exists and could be applied to breach the attorney-client privilege protection of fee agreements, Exxon has failed to make a prima facie showing of facts sufficient to support application of the exception here. Attorney-client privilege "has been a hallmark of Anglo-American jurisprudence for almost 400 years, [citation]" (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599), and "clearly [a privilege] which our judicial system has carefully safeguarded with only a few specific exceptions." (*Id.* at p. 600) Overcoming the privilege here requires, at minimum, a showing of illegality or abuse of the attorney-client relationship. (Cf. Evid. Code, § 956.) Exxon contends the requisite illegality is a violation of the duty of neutrality required by

Clancy and *Santa Clara*, but provides an inadequate factual basis evidencing Merced's alleged illegality.

Attorney-Client Privilege

The attorney-client privilege is statutorily granted, (Evid. Code, §§ 911, 950 et seq.) and "[c]ourts may not add to the statutory privileges except as required by state or federal constitutional law [citations] …." (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 373; see also *People v. Velasquez* (1987) 192 Cal.App.3d 319, 327 ["the Legislature clearly intended to abolish common law privileges and to keep the courts from creating new nonstatutory privileges as a matter of judicial policy"].) Fee agreements are specifically protected by attorney-client privilege pursuant to section 6149, which brings fee agreements under the definition of "confidential communication" set forth in Evidence Code section 952, rendering them protected by attorney-client privilege under Evidence Code section 954.

The Supreme Court recently noted, "[T]he privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case." (*Costco*, *supra*, 47 Cal.4th at p. 732, internal quotations and citation omitted) Thus, unlike circumstances involving qualified or governmental privileges, such as the official information privilege under Evidence Code section 1040, in cases involving the attorney-client privilege the courts are subject to Evidence Code section 915, subdivision (a), which prohibit a "presiding officer" from requiring disclosure of information claimed to be privileged in order to rule on the claim of privilege. This is in contrast to a qualified privilege, where the judge may make a determination to compel disclosure, weighing the consequences of public disclosure against the consequences to the litigant of nondisclosure (see Evid. Code, § 1040, Assem. Com. on Judiciary, Cal. Law Revision Com. com. , 29B pt. 3B West's Ann. Evid. Code (2009 ed.) fall. §1040, p. 83), and may require the party asserting the privilege to disclose, in chambers, the allegedly privileged material for the judge to make a

determination of whether or not the information is privileged. (Evid. Code, § 915, subd. (b).)

The Supreme Court reinforced the primacy of Evidence Code section 915's prohibition on evaluating a document to determine whether or not it is protected by attorney-client privilege in *Costco*, *supra*, 47 Cal.4th 725. In that case, the trial court directed a referee to conduct an in camera review of an opinion letter sent by outside counsel to a corporate client, allowing the referee to redact the letter to conceal portions the referee believed to be privileged, and ordering the client to disclose the remainder to the opposing party. (*Id.* at p. 730.) The Supreme Court disagreed with the trial court's actions, holding that "[t]he attorney-client privilege attaches to a confidential communication between the attorney and the client and bars discovery of the communication irrespective of whether it includes unprivileged material." (*Id.* at p. 734.) The court went on to discuss Evidence Code section 915's prohibition on disclosure of information asserted to be privileged to rule on the claim of privilege, discussing first the work product privilege and a court's ability to view the information in chambers under Evidence Code section 915, subdivision (b), before explaining, "[n]o comparable provision permits in camera disclosure of information alleged to be protected by the attorney-client privilege." (*Id.* at p. 736)

We note again that Merced, in connection with its motion for reconsideration of the first motion to compel disclosure of the fee agreement, submitted a declaration under seal, to which the fee agreement and its amendment were attached. Where disclosure of evidence is under coercion, such as where disclosure was erroneously required by the presiding officer, there is no waiver of the privilege. (Evid. Code, §§ 912 & 919; Evid. Code, § 919, Law. Rev. Comm. com. to 1974 Amendment, p. 272 ["after disclosure of privileged information has been erroneously required to be made by order of a trial court or other presiding officer, neither the failure to refuse to disclose nor the failure to challenge the order … amounts to a waiver and the disclosure is one made under coercion

for the purposes of Sections 912(a) and 919(a)(1)"]; see also *Costco, supra*, 47 Cal.4th at p. 738-739.) Thus, we find no waiver of the privilege when Merced disclosed the fee agreement as it was an accommodation to the court and in compliance with the trial court's motion to compel disclosure while Merced continued to pursue a remedy to prevent the improper disclosure of privileged material. (See also *BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1252 (*BPAE*) [finding no waiver where petitioner's concession of application of the crime-fraud exception stemmed from an "erroneous legal conclusion under which both parties and the court labored rather than an intentional and knowing relinquishment."].)

Exceptions to the Attorney-Client Privilege

The Legislature also specifically prescribed statutory exceptions to the attorney-client privilege.[10] In their briefing, the parties did not contend that any statutory exception applies here to breach attorney-client privilege.[11] Exxon instead urged this

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[10] The statutory exceptions to attorney-client privilege are set forth in Evidence Code sections 956 through 962, which titles are as follows (all excerpted from West's Ann. Cal. Evid. Code):

"956. Exception: Crime or fraud.
"956.5. Exception: Prevention of criminal act likely to result in death or substantial bodily harm.
"957. Exception: Parties claiming through deceased client.
"958. Exception: Breach of duty arising out of lawyer-client relationship
"959. Exception: Lawyer as attesting witness.
"960. Exception: Intention of deceased client concerning writing affecting property interest.
"961. Exception: Validity of writing affecting property interest.
"962. Exception: Joint clients."

[11] Raising the issue for the first time in oral argument, Exxon contends that the statutory crime-fraud exception embodied in Evidence Code section 956 applies. As discussed further below, for the same reasons we find Exxon fails to make a prima facie showing for an implied exception, we also find Exxon fails to make a prima facie showing of fraud under Evidence Code section 956.

court to recognize a nonstatutory *Clancy* exception to the attorney-client privilege permitting discovery of contingency fee agreements in public nuisance actions.

The same prohibition on judicial creation of non-statutory privileges, however, holds true for creating a non-statutory exception to the privilege "because the area of privilege 'is one of the few instances where the Evidence Code precludes the courts from elaborating upon the statutory scheme.' (Evid. Code, § 911, Cal. Law Revision com.)" (*Dickerson v. Superior Court* (1982) 135 Cal.App.3d 93, 99 (*Dickerson*).) The *Dickerson* court noted the attorney-client privilege "can be limited only by statutory exceptions," (*ibid.*) a statement reiterated by the Supreme Court in *Roberts*, *supra*, 5 Cal.4th at p. 373, when it stated, "nor may courts imply unwritten exceptions to existing statutory privileges."

The Supreme Court further explained in its opinion in *Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 209: "What courts in other jurisdictions give as common law privileges they may take away as exceptions. We, in contrast, do not enjoy the freedom to restrict California's statutory attorney-client privilege based on notions of policy or ad hoc justification [citation]." Furthermore, after discussing two cases regarding trustee duties to beneficiaries, the *Wells Fargo Bank* court stated, "[i]n neither [of the two cases], however, did we address any question concerning the attorney-client privilege. To attempt to use those decisions as the foundation for an implied exception to the attorney-client privilege, would, moreover, be inconsistent with the rule that we have no power to create such exceptions [citation]." (*Id.* at p. 207-208; see also *Shannon v. Superior Court* (1990) 217 Cal.App.3d 986, 997-998 ["The recognition of a 'necessity' exception to the privilege, as sought here by real parties, would be tantamount to the first step in the ultimate abolition of the privilege. [Citation.]"].) We are faced with a similar situation here, where Exxon is urging this court to recognize an exception to the attorney-client privilege permitting discovery of contingency fee agreements in public nuisance actions based on two cases that make almost no mention of the privilege at all.

Prima Facie Showing for Application of Exception

Notwithstanding the restrictive statutory scheme for attorney-client privilege, assuming, for the sake of argument, that *Clancy* and *Santa Clara* establish a nonstatutory exception to the attorney-client privilege, Exxon must still make a prima facie showing of facts supporting application of the exception. (See *Shannon, supra,* 217 Cal.App.3d at p. 996 [when the proponent of the privilege has made a threshold demonstration of the privilege, "the burden shifts to the opponent, the real parties here, to establish a cognizable basis for compelling disclosure."]; see also Evid. Code, §§ 400, 403.) Exxon asserts that the public policy behind Evidence Code section 956's crime-fraud exception to the attorney-client privilege is the same as that behind a *Clancy* exception,[12] explaining, "[a]brogation of the privilege is appropriate" where a situation enables illegal behavior. Furthermore, "where the attorney-client relationship is formed for the purpose of illegal or fraudulent activity, the privilege cannot apply." We agree with the fundamental premise that the attorney-client relationship cannot be abused by acting as a shield for illegal activity. Determination of an abuse of the relationship, however, requires more than a mere assertion of abuse. (See *Nowell v. Superior Court*, *supra*, 223 Cal.App.2d at p. 657 (*Nowell*); *Dickerson, supra,* 135 Cal.App.3d at p. 100.) To consider application of an exception analogous to the statutory crime-fraud exception, we look for a prima facie showing of illegality.

In *BPAE, supra,* 199 Cal.App.3d 1240, this court discussed the prima facie showing necessary to support application of the statutory crime-fraud exception, explaining,

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[12] Evidence Code section 956 states: "There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud."

> "There is little case law in California addressing the nature of a prima facie showing under Evidence Code section 956. According to *Nowell* [, *supra*,] 223 Cal.App.2d 652, 657[], mere assertion of fraud is insufficient; there must be a showing the fraud has some foundation in fact. *People v. Van Gorden* (1964) 226 Cal.App.2d 634, 636-637, [], describes a prima facie case as one which will suffice for proof of a particular fact unless contradicted and overcome by other evidence. In other words, evidence from which reasonable inferences can be drawn to establish the fact asserted …." (*BPAE*, *supra*, 199 Cal.App.3d at p. 1262.)

This court proceeded to analyze specific statements in a letter at issue and concluded the real parties in interest "made a prima facie showing that [petitioner] sought its attorney's services to assist in the commission or planning of a fraud."[13] (*Id.* at p. 1269.)

Here, Exxon contends contingency fee agreements must be discoverable where they constitute an abuse of the privilege. Specifically, Exxon contends Merced should not be permitted to use the contingency fee agreement as means to engage in illegal activity -- in the form of breaching the duty of neutrality owed by government attorneys -- while remaining shielded by the privilege. Mere assertion, however, that abuse exists, without a factual basis, is insufficient support for application of the exception Exxon proposes. (See *Nowell*, *supra*, 223 Cal.App.2d at p. 657 ["it would be destructive of the privilege to require disclosure on the mere assertion of opposing counsel"].) On the record before us, Exxon fails to make a prima facie showing of any illegal purpose on the part of Merced.

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[13] As noted, *supra*, Exxon contended at oral argument, for the first time, that Merced's contingency fee agreement falls under the statutory crime-fraud exception to attorney-client privilege. Exxon asserts, without elaboration, that a contingency fee agreement constitutes a fraud. This court set forth the prima facie showing for application of the statutory crime-fraud exception, stating, "the proponent of the exception need only to prove a false representation of a material fact, knowledge of its falsity, intent to deceive and the right to rely." (*BPAE*, *supra*, 199 Cal.App.3d at p. 1263.) Exxon asserted no more facts for the statutory exception than for the non-statutory exception it proffered, and once again fails to make the prima facie showing required to apply the exception and breach the privilege.

At oral argument, Exxon contended that it made a prima facie showing of illegality by asserting essentially three facts: 1) a contingency fee agreement exists; 2) in a public nuisance action; 3) and Counsel has been making all appearances and filings in the action.[14] Were this court to find that Exxon's assertions constitute a prima facie showing of illegality permitting a breach of the attorney-client privilege, nearly every contingency fee agreement in a public nuisance action would be illegal. *Santa Clara* obviates this outcome with its holding that contingency fee agreements in certain circumstances more akin to an "ordinary civil case" than a criminal prosecution are permitted when restricted by provisions ensuring governmental neutrality.[15] (*Santa Clara, supra,* 50 Cal.4th at p. 56.)

Santa Clara creates somewhat of a conundrum in that it sets forth specific provisions the Supreme Court mandates inclusion of in retention agreements for public nuisance actions, the "objective verification" of which must be done "without the need

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[14] In briefing, Exxon attempted to show that Counsel was improperly acting in its own interests by citing a letter from Counsel to the State Water Resources Control Board in which Counsel stated it would have "no problem reimbursing the State from any recovery for its fair share, and are agreeable to the State having a lien if the State assigns to us the ability to make the claim, subject to our attorney's fees." Exxon misconstrues the letter, as the recovery mentioned is with regards to a separate action in federal court, and, as Merced explained, "[t]he purpose of the letter is to advise the State that any reimbursement from the City will be reduced by an amount equal to the attorney's fee that the City will pay [Counsel] for recovering those funds. The attorneys' fee paid from the reimbursement funds will not reduce the *City's* recovery, but rather the *State's* recovery."

[15] At oral argument, Exxon also first raised the argument that Merced's declarations with respect to control of the litigation evidenced Merced's non-compliance with *Santa Clara*. In response, Merced stated that the contingency fee agreement had been amended to reflect the provisions required by *Santa Clara*, a procedure approved of by the Supreme Court when it stated, "[a]ssuming the public entities contemplate pursuing this litigation assisted by private counsel on a contingent-fee basis, we conclude they may do so after revising the respective retention agreements to conform with the requirements set forth in this opinion." (*Santa Clara, supra,* 50 Cal.4th at p. 65.)

for engaging in discovery that might intrude upon the attorney-client privilege or attorney work product protections." (*Santa Clara*, *supra*, 50 Cal.4th at p. 64.) The Supreme Court addressed this by giving the benefit of the doubt to both government attorneys and their private counsel, explaining, "we presume that government attorneys will honor their obligation to place the interests of their client above the personal, pecuniary interest of the subordinate private counsel they have hired" (*id.* at p. 61), and further, "we decline to assume that private counsel intentionally or negligently will violate the terms of their retention agreements by acting independently and without consultation with the public-entity attorneys or that public attorneys will delegate their fundamental obligations." (*Id.* at p. 62, fn. omitted.) To address defendants' contention that determining who has "control" over the litigation would be difficult, the court set forth the provisions required to be included in retention agreements, and explained: "These practical concerns do not require the barring of contingent-fee arrangements in all public prosecutions. Instead, to ensure that public attorneys exercise real rather than illusory control over contingent-fee counsel, retainer agreements providing for contingent-fee retention should encompass more than boilerplate language regarding 'control' or 'supervision,' by identifying certain critical matters regarding the litigation that contingent-fee counsel must present to government attorneys for decision." (*Id.* At p. 63.) Regardless, we need not address *Santa Clara*'s ambiguity here, as we focus instead on the applicability of an exception to the attorney-client privilege sufficient to require disclosure of Merced and Counsel's contingency fee agreement.[16]

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16 Exxon also contended at oral argument, for the first time, that *Clancy* and *Santa Clara* created a "suspect class" of contingency fee agreements. We note the Supreme Court addressed this in a footnote in *Santa Clara*, a position we follow here: "We also decline the suggestion of defendants and their amici curiae to view all contingent-fee agreements as inherently suspect because of an alleged 'appearance of impropriety' created by such arrangements. Contingent-fee arrangements are deeply entrenched as a legitimate and sometimes prudent method of delegating risk in the context of civil litigation, and in the

The proper procedure to determine whether or not the contingency fee agreement is discoverable is for the trial court to determine whether or not Exxon has made a prima facie showing to support application of an exception to the attorney-client privilege. If the trial court cannot find an adequate preliminary factual basis for application of the exception, then compelling disclosure of the fee agreement is improper. A preliminary fact showing would include evidence that the provisions required by *Santa Clara*, *supra*, 50 Cal.4th 35, are not in the contingency fee agreement, or that Counsel and Merced are otherwise violating the duty of neutrality imposed on government attorneys and private counsel acting on their behalf in public nuisance actions under *Santa Clara*.

III.

DISPOSITION

The petition for writ of mandate is granted. Let a writ issue ordering the Superior Court to vacate its orders compelling disclosure of privileged documents and ordering the Superior Court to issue an order denying Exxon's motion to compel production.

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Ardaiz, P.J.

WE CONCUR:

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Wiseman, J.

_____
Levy, J.

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absence of evidence of wrongdoing or unethical conduct we decline to impugn this means of compensating counsel in the context of civil litigation." (*Santa Clara*, *supra*, 50 Cal.4th at 62, fn. 14.)